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ALEXANDER L. STEVAS

No. 81-805

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY TODISCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether government agents may install a pen register without a warrant.

2. Whether the Foreign Intelligence Surveillance Act requires warrant authorization for a pen register used to investigate domestic narcotics trafficking.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981. A petition for rehearing was denied on July 29, 1981. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 27, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York upon entry of a guilty plea to one count of conspiracy to possess and distribute heroin, 21 U.S.C. 846, and four counts of possession of heroin with intent to distribute it, 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to 30 years' imprisonment, to be followed by ten years' special parole.

Petitioner was the head of an organization that engaged in the wholesale distribution of massive amounts of extraordinarily pure heroin to other drug dealers in the New York City area. Petitioner arranged for the wholesale deliveries and sales of heroin. Two of petitioner's lieutenants, co-defendants Vallone and Barracano, stored and delivered heroin for petitioner. Co-defendants Torres and Acosta functioned as sellers and promoters. Co-defendants D'Angelo and Sferrazza were the chief suppliers of heroin for petitioner's organization. Co-defendant Zambuto stored heroin at his house, and co-defendant Campopiano, petitioner's uncle, helped plan sales and coordinate supplies.

The investigation of petitioner's organization began after an informant brought a Drug Enforcement Administration (DEA) agent a sample of heroin purchased from co-defendant Luis Acosta. Thereafter, DEA Agent William Silvestri, acting in an under-

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[1] Petitioner and seven of his co-defendants pleaded guilty prior to trial on the condition that they could appeal the denial of certain pre-trial motions. The one remaining co-defendant, David D'Angelo, was convicted following a jury trial. Three of the co-defendants have filed certiorari petitions, which raise issues unrelated to those presented by petitioner. *Zambuto* v. *United States*, No. 81-551; *D'Angelo* v. *United States*, No. 81-617; *Vallone* v. *United States*, No. 81-754.

cover capacity, began purchasing heroin from petitioner's organization. On May 14, 1980, Acosta and Torres made their first sale to Silvestri—one ounce of heroin for $9,500 (Tr. 574-582).[2] Agent Silvestri made four additional heroin purchases, approximately one eighth of a kilogram each, on May 27, June 26, August 1 and August 14, 1980 (Tr. 617-622, 681-691, 769-772, 1035-1038). On September 1, 1980, Agent Silvestri arranged to purchase three kilograms of heroin from Acosta on September 3. The sale was to take place in six half-kilogram installments (Tr. 1091-1108). At 9:25 a.m. on September 3, petitioner and co-defendant Vallone left petitioner's house and drove in separate cars to an apartment at 610 Waring Avenue in the Bronx. Petitioner and Vallone left the apartment at 10:30 a.m., and Vallone made the first delivery of half a kilogram of heroin. Vallone and petitioner returned separately to 610 Waring Avenue, and subsequently Vallone left to deliver the second half kilogram of heroin. Vallone was arrested in route to the second delivery. Petitioner had also left the Waring Avenue apartment but returned at 11:55 a.m. He was arrested inside the Waring Avenue apartment at 12:20 p.m. (Tr. 1170-1176; H-Tr. 1759-1766, 1772-1776).[3] A subsequent search of the apartment pursuant to a warrant revealed that it was a narcotics "stash." The apartment contained two kilograms of pure heroin, material for diluting and packaging the heroin, and several firearms (Tr. 1182-1192).

In June 1980, during the course of its investigation of petitioner's organization, the government obtained

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[2] "Tr." refers to the transcript of the D'Angelo trial.

[3] References to the transcript of pretrial hearings are cited as "H-Tr."

orders from a Magistrate in the Southern District of New York, under Fed. R. Crim. P. 57(b), to install two pen registers on petitioner's home telephones. The information obtained from the pen registers later contributed to the finding of probable cause necessary to obtain a warrant for electronic surveillance of petitioner's telephone.

ARGUMENT

1. Petitioner contends (Pet. 3-7) that a pen register may not be installed by federal agents unless authorized by a search warrant based on probable cause. Petitioner did not raise this claim before the district court, and the court of appeals properly held that the claim had been waived (Pet. App. 3a). *United States* v. *Rollins*, 522 F. 2d 160, 165 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976). But even if petitioner's claim had not been waived, it is without merit because it is squarely foreclosed by this Court's decision in *Smith* v. *Maryland*, 442 U.S. 735 (1979). In that case the Court held that the operation of a pen register is not a search within the meaning of the Fourth Amendment (442 U.S. at 745-746). Petitioner attempts to distinguish *Smith* on the ground that there the pen register was installed by telephone company officials at the request of the police, whereas here the pen register was installed directly by DEA agents. But in *Smith* this Court explicitly assumed that the telephone company was acting as the agent of the police for Fourth Amendment purposes. 442 U.S. at 739 n.4.[4] Accordingly, there

[4] That assumption was necessary in order to make the threshold determination that there was sufficient "state action" to make Fourth Amendment analysis appropriate.

is nothing to distinguish the facts in this case from those presented in *Smith* v. *Maryland*, *supra*, and there is no need for further review of petitioner's claim.[5]

2. Petitioner contends (Pet. 7-8) that the Foreign Intelligence Surveillance Act, 50 U.S.C. (Supp. III) 1801 *et seq.* ("FISA"), forbids the use of a pen register without a warrant in the investigation of a major narcotics organization. Petitioner did not raise this claim below either, and therefore it also has been waived. *United States* v. *Rollins*, *supra*. In any event, the claim has no merit. The FISA applies when the "target of the electronic surveillance is a foreign power or an agent of a foreign power * * *." 50 U.S.C. (Supp. III) 1805(a)(3)(A).[6] Accordingly, the FISA warrant procedure could not be

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[5] Petitioner's assertion (Pet. 4-6) that he had a legitimate expectation of privacy from governmental, as opposed to telephone company, discovery of the numbers he dialed is inconsistent with the Court's reliance in *Smith* on the established principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" (442 U.S. at 743-744; citations omitted). It can hardly make a constitutional difference that the telephone company chose to turn the information flowing over its wires over to the government by permitting the DEA agents to have access to the telephone facilities themselves, rather than by installing the pen registers at government request and relaying the information they revealed to the government.

[6] When the FISA was enacted in October 1978, this Court had not yet ruled on whether the operation of a pen register constituted a search and seizure within the meaning of the Fourth Amendment. The legislative history reflects that Congress in that circumstance chose to include pen registers within the definition of "electronic surveillance" to be regulated by the provisions of FISA. H.R. Rep. No. 95-1283, 95th Cong., 2d Sess. 51, 97 (1978).

used when the targets of the investigation are American heroin dealers, such as petitioner, even though importation of heroin may be part of their scheme. The FISA simply has no applicability to petitioner's criminal conduct or the government's means of investigating that conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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